PP

v.

AHMAD HUSSIN ZAMIR HUSSIN

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[CRIMINAL TRIAL NO: 45-6-1998]
25 JUNE 1998

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 37(d) - Presumption of possession - What amounts to possession*

EVIDENCE: *Presumption - Onus to rebut - Possession and trafficking - Whether presumptions must be rebutted separately - What is the standard of proof to rebut a presumption - Dangerous Drugs Act 1952, ss. 37(d) & (da)*

CRIMINAL PROCEDURE: *Prosecution - Close of prosecution - Prima facie case - Offence committed after 31 January 1997 - What is the appropriate standard of proof - Whether prosecution had made out prima facie case - Criminal Procedure Code (Amendment) Act 1997, s. 180*

CRIMINAL PROCEDURE: *Trial - Recall of witnesses - When ought court to exercise power to recall - Whether court must recall witness upon application of one party with consent of other party - Criminal Procedure Code, s. 425*

The accused was charged for trafficking in dangerous drugs in contravention of s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'), punishable under s. 39B(2) of the same Act. According to the facts adduced by the prosecution, the accused was found to have in his custody and control a white plastic bag which contained 57.6g of mixed heroin and monoacetylmorphines, thus raising the presumptions of possession under s. 37(d) and of trafficking under s. 37(da) of the DDA.

The accused denied that the plastic bag belonged to him, alleging instead that it belonged to a person called Nasir.

Held:

[1] The prosecution had succeeded in establishing a *prima facie* case against the accused and the burden of proof therefore shifted to the accused to rebut the presumptions of possession and trafficking on a balance of probabilities.

[2] The word 'possession' is a vague and general word which cannot be closely defined. A man must know of the existence of a chattel and have some idea of its whereabouts before he can exercise any control over it. The word 'possession' therefore implies some knowledge but not necessarily full or exact knowledge.

[2a] On the facts of the case, in all probability, the accused must have fled after the Inspector (who was with a police party) introduced himself. This was because the accused knew that he was carrying the offending exhibits. The person called Nasir on whom the accused tried to shift the blame did not even exist.

[3] It would appear therefore that applying the *Radhi* direction which calls for a separate exercise of the presumptions in ss. 37(d) and (da) of the DDA, the defence had not rebutted the statutory presumptions of possession and trafficking in either of the sections. Thus, upon considering all the evidence adduced before the court, the prosecution had proved its case beyond a reasonable doubt.

Obiter:

[1] The powers to recall witnesses accorded to the court under s. 425 of the Criminal Procedure Code ('the CPC') are entirely discretionary and the court cannot be forced to exercise them at the whims and fancies or at the bidding of any of the parties. The recalling of a witness under s. 425 of the CPC is permitted whenever it is essential to the just decision of the case. The mere recalling of a witness by itself can never constitute an irregularity irrespective of the exigencies of the situation and the discretion exercisable under s. 425 of the CPC would depend on the facts of each case.

[2] The present case dealt with an offence allegedly committed on 3 May 1997, well after the date of the amendment to s. 180 of the CPC. Therefore, the court needs only to apply the *prima facie* standard of proof at the close of the prosecution case.

[Accused convicted and sentenced to death.]

Case(s) referred to:
A Ragunathan v. PP [1982] 1 CLJ 25 ***(refd)***
Abdul Latif v. State of Uttar Pradesh AIR [1978] SC 472 ***(refd)***
AEG Carapiet v. AY Derderian AIR [1961] Cal 359 ***(refd)***
Agya Ram v. State of Uttar Pradesh [1990] 1 Crimes 23 ***(refd)***
Arulpragasan Sandaraju v. PP [1996] 4 CLJ 597 ***(refd)***
Bahruni Ismail v. PP [1997] 3 CLJ 267 ***(refd)***

Browne v. Dunn [1893] 6R 67 ***(refd)***
Dalip Bhagwan Singh v. PP [1997] 4 CLJ 645 ***(refd)***
Flanagan v. Fahy [1918] 2 IR 361 ***(refd)***
Ganapathy Rengasamy v. PP [1998] 2 CLJ 1 ***(dist)***
Gooi Loo Seng v. PP [1993] 2 MLJ 137 ***(refd)***
Harbhajan v. State of MP [1989] Cr LJ 2205 (MP) ***(refd)***
Haw Tua Tau v. PP [1981] 1 CLJ 123 ***(refd)***
Inayat v. Rex AIR [1950] All 360 ***(refd)***
Jagdish Chander v. State of Haryana [1983] Cr LJ 235 ***(refd)***
Khoo Hi Chiang v. PP [1994] 2 CLJ 151 ***(refd)***
Leow Nghee Lim v. Reg [1956] 22 MLJ 28 ***(refd)***
Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073 ***(dist)***
Mohd Hussein Umar Kochra v. KS Dalipsinghji AIR [1970] SC 45 ***(refd)***
Multar v. Lim Kim Chet & Anor [1982] 1 CLJ 107 ***(refd)***
Munusamy v. PP [1987] 1 MLJ 492 ***(refd)***
Noor Mohd v. Imtiaz Ahmad AIR [1942] Oudh 130 ***(refd)***
PP v. Abang Abdul Rahman [1982] 1 MLJ 346 ***(refd)***
PP v. Abdul Rahim Abdul Satar [1990] 1 CLJ 840 ***(refd)***
PP v. Boo Chew Hia [1963] MLJ 33 ***(refd)***
PP v. Loh Keng Koh [1967] 1 MLJ 97 ***(refd)***
PP v. Mohamed Noor Jantan [1979] 2 MLJ 289 ***(refd)***
PP v. Phon Nam [1988] 3 MLJ 415 ***(refd)***
Ramli Kechik v. PP [1986] 2 MLJ 33 ***(refd)***
Re Pichi Muthu [1970] 2 MLJ 143 ***(refd)***
Seng Chong Metal Works Ltd v. Lew FA [1966] 2 MLJ 63 ***(refd)***
Shamsudin v. Yap Choh Teh & Anor [1969] 1 MLJ 26 ***(refd)***
State v. Bhanuprasad Shyamlal Joshi AIR [1967] Bom 378 ***(refd)***
State of Gujarat v. Butasing Indrasing [1990] 3 Crimes 619 ***(refd)***
State of Gujarat v. Manzoorali Alibax [1985] 1 Crimes 542 ***(refd)***
Wong Swee Chin v. PP [1981] 1 MLJ 212 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 180, 182A(i), (ii), 425
Dangerous Drugs Act 1952, ss. 37(d), (da)(iii), 39B(1)(a), (2)
Evidence Act 1950, s. 138(2)

Other source(s) referred to:
Putting and Suggesting in Cross-Examination, 1984 1 MLJ xi

For the accused - Hanif Hassan; M/s L Parthiban & Assoc
For the prosecution - Iskandar Shah Ibrahim DPP

Reported by Mariette Peters-Goh

JUDGMENT

Abdul Malik Ishak J:

The accused was charged for trafficking, on his own behalf, in a dangerous drug, to wit, 57.6 grammes of mixed heroin and monoacetylmorphines (3.7 grammes heroin and 53.9 grammes monoacetylmorphines) in contravention of s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("Act") and punishable under s. 39B(2) of the same Act. The offence was alleged to be committed by the accused on 3 May 1997 at about 4pm at the compound of house no: 28, Jalan Dato' Jaafar, Larkin Garden, in the district of Johor Bahru, in the State of Johore.

The trial proceeded smoothly and the case for the prosecution may conveniently be stated as follows: On 3 May 1997, Inspector Mohd Zulkifli bin Daud ("Zulkifli") had received certain information from a member of the public over the telephone in regard to the accused who was said to be wearing a long sleeved white shirt and green coloured trousers and without further ado, at about 3.10pm of the same day, Zulkifli briefed his police party comprising of Detective Corporal 65737 A. Huzaimi bin A. Rahman ("Huzaimi"), Detective Corporal 100625 Mohd. Kassim bin Mohd. Zain ("Kassim"), Detective Corporal 100503 Mohd. Yassin bin Yusof ("Yassin") and Detective Corporal 59430 Abdul Razak bin Othman ("Razak") in regard to that information. Having assembled and briefed his police personnel, Zulkifli then proceeded in Kassim's car to the scene of the crime as set out in the charge with his police party and arrived there at about 4pm. Zulkifli and his police party were in civilian clothes.

Soon thereafter, Zulkifli and his police party spotted the accused who was attired in the manner as described by the member of the public alluded to earlier, walking along Jalan Dato' Jaafar, Larkin Garden towards the brown coloured gate as seen in the coloured photographs of P6A and P6B. In relation to the coloured photograph at P6A, Zulkifli was able to mark an "X" using a red coloured ball point pen on that photograph to signify the location of the accused when Zulkifli first spotted him. According to Zulkifli, he and his police personnel were all seated in Kassim's car which was also parked along Jalan Dato' Jaafar, Larkin Garden, some 10 feet behind the accused. At the material time the accused was seen walking alone and was holding a white plastic bag (P8) in his right hand. Zulkifli and his police party swing into action; they alighted from the car and approached the accused. Zulkifli produced his warrant card and announced his identity. The accused took flight and he ran in the direction of the house with a brown coloured gate as seen in the coloured photographs marked as P6A and P6B as alluded to earlier. While running, the accused

was seen by Zulkifli and his police party carrying and holding that white plastic bag (P8) in his right hand. Zulkifli and his police party gave chase as soon as they saw the accused running away with the white plastic bag (P8). While giving chase, Zulkifli saw the accused swing the white plastic bag (P8) with his right hand and throw it inside the front compound of house no: 28, Jalan Dato' Jaafar, Larkin Garden. At that time, Zulkifli was not certain where exactly the white plastic bag (P8) landed but he was positive that it landed in the front compound of that house. Zulkifli continued chasing the accused and he was accompanied by Kassim, Yassin and Razak. Huzaimi stood vigil outside house no: 28, Jalan Dato' Jaafar, Larkin Garden dutifully keeping an eye on the white plastic bag (P8) that landed in the front compound of the house in question.

Not far from the said house the accused was arrested by Kassim who then handcuffed the accused. The latter was then escorted back to the said house by Zulkifli and the police party. Outside the said house, Zulkifli saw Huzaimi waiting patiently. The front gate of the said house was not locked. It was merely closed and it was not left ajar like the ones in photographs P6A and P6B. As soon as Zulkifli opened and entered the front gate of the said house, he saw the white plastic bag (P8) lying on the front compound of the said house at point "ZZ" marked by Zulkifli in photograph P6C in the course of the trial. Incidentally, Zulkifli had earlier on mistakenly marked point "Z" in photograph P6C to reflect the location of the white plastic bag (P8). Be that as it may, according to Zulkifli, the white plastic bag (P8) was similar to the one that the accused held in his right hand and eventually threw into the compound of the said house. The compound of the said house was deserted. Not a soul was in sight. There was only the white plastic bag (P8) lying on the floor of the front compound of the said house. These were the observations of Zulkifli as he entered the front compound of the said house for the very first time that fateful day.

Zulkifli picked up the white plastic bag (P8) and examined its contents in the presence of the accused. The rest of the police party witnessed it also. That white plastic bag (P8) bore the handwriting "Ng Ming Huat Sdn Bhd" and inside it were two unsealed brown coloured envelopes, being P9 and P10. Inside these two unsealed brown coloured envelopes were white plastic packets (P11 and P12) each of which in turn contained a granular substance suspected to be heroin. Having examined the contents of the white plastic bag (P8), Zulkifli then put back all its contents inside the same white plastic bag (P8) and held it. Zulkifli introduced himself to the owner of the said house – an Indian woman by the name of Nanjamah a/p

Vanthamuduliar without informing her of the recovery of the white plastic bag (P8) in the front compound of her house. When Zulkifli spoke to that Indian woman, the accused was at the compound of the said house guarded by the police personnel. That Indian woman was inside the said house at the material time and she identified herself as the owner of the said house.

From the scene, the accused escorted by the police and the incriminating exhibits were brought to the narcotics department in Johor Bahru and arrived there approximately at 4.45pm of the same day. It must be placed on record that Zulkifli held dearly onto that white plastic bag (P8) and its contents after its seizure. Upon arrival at the narcotics department, Zulkifli signed and dated 3 May 1997 on the white plastic bag (P8). He did the same for the two unsealed brown coloured envelopes (P9 and P10) and the two white plastic packets (P11 and P12). Thereafter, Zulkifli kept all these exhibits under lock and key. Meanwhile, the accused was kept in the lock up.

On 3 May 1997 at 10pm, Zulkifli handed all the exhibits seized to Chief Inspector Hj. Zahari bin Ismail, the investigating officer of the case.

Zulkifli with ease identified all the exhibits that he picked up from the front compound of the said house as reflected in the coloured photographs numbered P5A, P5B and P5C. Zulkifli was categorical when he said that exhs. P11 and P12 contained the suspected heroin at the material time and at the time when he handed the same to the investigating officer. The remnants of the suspected heroin in exh. P13 were shown to Zulkifli and he rightly said that the contents of exhs. P11 and P12 when he first saw them were different from that of exh. P13. According to Zulkifli, the contents of exhs. P11 and P12 were granular in nature.

When cross-examined by Mr. Hanif Hassan, Zulkifli denied that he knew the surrounding area as he had arrived much earlier. Zulkifli too denied that the accused was with someone else. Zulkifli too did not agree to the suggestion that the white plastic bag (P8) was held by that someone else. Zulkifli was emphatic that he saw the accused alone at the material time and that the accused was holding in his right hand the white plastic bag (P8). Zulkifli was quite categorical under cross-examination when he said that he saw the accused throw the white plastic bag (P8) inside the front compound of house no: 28, Jalan Dato' Jaafar, Larkin Garden. Zulkifli disagreed that that someone else had fled in the direction of the Chinese school. It was suggested to Zulkifli that when he first approached the accused he had the opportunity of arresting the accused. But this was disagreed by Zulkifli. It was categorically stated by Zulkifli that no one directed Huzaimi to wait outside the said house after the accused had

thrown the white plastic (P8) inside the front compound of that house. Zulkifli admitted that it was he, assisted by the other three police personnel (Kassim, Yassin and Razak), that arrested the accused. Zulkifli categorically stated that Huzaimi did not chase after anyone as he stood vigil outside the said house. After arresting the accused, Zulkifli and his three police personnel returned directly to the said house. Zulkifli denied that he called out to the owner of the said house to open the front gate which was closed. It was boldly suggested to Zulkifli that:

(1) the white plastic bag (P8) and its contents were not found at the front compound of the said house; and

(2) that the white plastic bag (P8) and its contents were placed at the front compound of the said house by Zulkifli or his police personnel.

and Zulkifli categorically denied such suggestions. It seemed that such suggestions were made because initially Zulkifli could not identify the exact location of the white plastic bag (P8) in relation to the photograph in P6C. Zulkifli emphatically said that the accused did not say that his feet were hurt when he was arrested.

The re-examination of Zulkifli was rather short. It focussed on who was the first to arrest the accused. The answer advanced by Zulkifli was Kassim.

Huzaimi testified and his testimony corroborated that of Zulkifli in material particulars. Of significance would be the version of Huzaimi to the effect that he gave chase together with Zulkifli and the rest of the police personnel when the accused ran away together with the white plastic bag (P8) after Zulkifli identified his office to the accused. Initially, Huzaimi saw the accused walking alone along Jalan Dato' Jaafar, Larkin Garden carrying the white plastic bag (P8) in his right hand and he too, as I said, saw the accused bolt with the white plastic bag (P8). As Huzaimi gave chase he saw the accused throw the white plastic bag (P8) into the front compound of house no: 28, Jalan Dato' Jaafar, Larkin Garden. This prompted Huzaimi to stop chasing after the accused and stand guard outside the said house. According to Huzaimi he stood outside the pink wall of the said house as seen in photograph P6A and from his position he saw the white plastic bag (P8) lying on the floor of the front compound of the said house opposite the chicken coop at marking "ZZ" of photograph P6C. There was no other plastic bag lying on the floor of the front compound of the said house except the white plastic bag (P8) in question. From his observation, there was no one at the front compound of the said house. According to Huzaimi the pink brick wall of the said house had small

Roman pillars with gaps as seen in photograph P6C and this enabled him to see clearly the white plastic bag (P8) lying on the front compound of the said house. It was an unobstructed view for Huzaimi. The latter kept his eyes glued to the white plastic bag (P8) lying on the front compound of the said house for approximately five (5) minutes before Zulkifli returned with the accused and the three police personnel. The accused at that time was already handcuffed. Huzaimi testified that it was Zulkifli that opened the front gate of the said house and it was Zulkifli that picked up the white plastic packet (P8) that was lying on the front compound of the said house and examined its contents in the presence of the accused and the police personnel. Before leaving the scene, Huzaimi testified that Zulkifli met and spoke to the owner of the said house – an Indian woman. Just like Zulkifli, Huzaimi was able to identify the white plastic bag (P8), the two unsealed brown coloured envelopes (P9 and P10), the two white plastic packets (P11 and P12) which was filled to the brim with the suspected heroin at that time and now totally empty. In this regard, the coloured photographs at P5A, P5B and P5C were identified by Huzaimi to be the photographed versions of those exhibits at the material time.

Under cross-examination, Huzaimi admitted that he and the police party had every opportunity to arrest the accused once they alighted from the motorcar. Huzaimi too agreed that within the five (5) minutes span of waiting outside the said house he had every opportunity to enter the compound of the said house but Huzaimi categorically stated that he did not enter the compound of the said house within that period of time. Huzaimi denied that he was not in the motorcar when he first saw the accused. It was suggested to Huzaimi that he and the police party waited in a house that was located at the far end of Jalan Dato' Jaafar – to be exact at the background of photograph P6A, but Huzaimi denied it outrightly. Huzaimi further disagreed that when he first saw the accused, the accused was with another male person. Huzaimi denied that he gave chase to that male person. It was put and Huzaimi disagreed that the other male person was located across the road of Jalan Dato' Jaafar and that male person had since run away. Huzaimi too disagreed that at the scene of the crime there were other persons other than the accused and the police party. It was further put and Huzaimi disagreed that the accused was wearing a grey coloured vest at the time of his arrest. When it was put to Huzaimi that he did not see the accused throwing the white plastic bag (P8) into the front compound of the said house, Huzaimi immediately denied that suggestion.

The re-examination of Huzaimi was short and sweet. Huzaimi testified that it was normal practice for the police personnel before apprehending a suspect to, firstly, identify themselves to the suspect and, secondly, to examine the suspect. Even though there was an opportunity to arrest the accused much earlier, Huzaimi did not avail himself of that golden opportunity. According to Huzaimi, the accused was only suspected of committing a single offence. Somehow Huzaimi explained that Zulkifli wore a T-shirt and dark trousers on that day. Huzaimi reiterated that he stood vigil outside the said house for five minutes before Zulkifli returned with the accused and the police party.

The Indian woman, the owner of the said house, gave evidence for the prosecution. She testified that in 1997 she stayed in that house. She identified the said house by pointing to a photograph marked as P6B. She narrated that on 3 May 1997, while she was viewing television, at about 4pm, several police personnel and a person who had been handcuffed came to her house. She did not know why they came to her house on that day. She too could not identify the members of the police party. She heard that the person who was arrested was in the dock but she categorically stated that she had forgotten. Of importance were her assertions that on that fateful day she did not come out of her house and that only one policeman took her personal particulars. Under cross-examination, she testified that she had stayed in that house for 14 years. Her family members too stayed in that house. When the police came on that day, her three grandchildren were asleep and she testified that she was watching television. She testified that on that day, the front gate of her house was unlocked. She heard footsteps, she looked out and saw a policeman showing his warrant card. There were several policemen and they told her not to worry. She said she was shocked and she did not utter a word. She too was shocked when she saw a person was handcuffed. She could not remember the attire of the police personnel on that day. She said that in front of her house was a main road and normally there was a lot of people there when school ended. She testified that her grandchildren did not wake up when the police party came to her house with the man who was already handcuffed on that fateful day. Her three grandchildren slept right through the episode. There was no re-examination of the Indian woman. To questions by the court she said that the police did not explain to her as to why the accused was handcuffed and neither did the police show her a white plastic bag or any plastic bag for that matter.

Mr. Hanif Hassan, learned counsel for the accused, applied to recall Zulkifli under s. 425 of the Criminal Procedure Code (FMS Cap 6) – ("CPC"). The learned deputy public prosecutor in the person of Mr. Iskandar Shah Ibrahim magnanimously agreed to the application to recall Zulkifli. Section 425 of the CPC enacts as follows:

> Any Court may at any stage of any inquiry, trial or other proceeding under this Code summon any person as witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine any person already examined, and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case.

and it is divided into two parts. The first part is governed by the word "may", while the second part is governed by the word "shall". Under the first part, the court is given a discretion of a wide nature at any stage of any inquiry, trial or other proceeding to:

(i) summon any one as a witness, or

(ii) examine any person present in Court, or

(iii) recall and re-examine any person whose evidence has already been recorded by the Court.

The second part being mandatory in its application gives the court some measure of compulsion in that the court is compelled to adopt and take any of the aforesaid steps being, step (i) or step (ii) or step (iii), provided the new evidence appears to it essential to the just decision of the case (*Abdul Latif v. State of Uttar Pradesh* AIR [1978] SC 472). Put bluntly, s. 425 of the CPC is an enabling provision. It enables the court at any stage of any inquiry, trial or other proceeding to summon any person as a witness. The power is not confined to a particular person to be called as a witness but it extends to all classes of persons. The power is conferred to the court in its quest to serve justice and to do justice between the parties. After all, the court's only master is justice and it is justice that the court must be subservient to. It has been said time and again that justice cannot be viewed from the angle of the prosecutor or the accused's person, rather justice should be viewed from the point of view of an orderly society. Holding the balance of the scales of justice is not an easy task. It requires an uncanny skill and sheer tolerance. It also requires a judicial mind of the highest order. The court in order to balance that justice must always keep an open mind. In keeping an open mind, the court is always receptive to the suggestion of any party to the proceeding in regard to the desirability of a particular evidence but at the end of the day the

decision and the discretion would entirely fall on the court (*Agya Ram v. State of Uttar Pradesh* [1990] 1 Crimes 23, 25). It is imperative that the court should not remain idle in an application under s. 425 of the CPC but must rise up to the occasion and decide the matter once and for all (*State of Gujarat v. Butasing Indrasing* [1990] 3 Crimes 619, 624), but the court must act with utmost circumspection when there is a likelihood that the fresh evidence may prove to be prejudicial to the accused under the first part to s. 425 of the CPC. Whereas the second part being an imperative provision it simply requires the court to be satisfied that the evidence to be summoned appears to the court to be essential to the just decision of the case (*Public Prosecutor v. Phon Nam* [1989] 1 CLJ 6; [1988] 3 MLJ 415 which arose out of an appeal from *Public Prosecutor v. Phon Nam* [1987] 2 MLJ 262). It is interesting to note that the court in *Inayat v. Rex* AIR [1950] All 360, 370 held that the court merely examines the evidence not to help the prosecution nor the accused but rather to examine the evidence in the interest of justice. Since the legislature has given this power to the court, it is the duty of the court to ascertain the truth before the case has been decided but after the parties have concluded the evidence or argued the case. Now, if the provisions were intended for the benefit of the parties it may be argued that a party, having exhausted all the opportunities allowed to it, should not be permitted to introduce further evidence. But, as I said, this is not the intention of the legislature to insert this particular provision for the benefit of a particular party. In my view, after the parties have led all the evidence and the court has thoroughly considered those evidence, the stage is set for the court to adopt step (i) or step (ii) or step (iii) provided the court feels the necessity to examine the additional evidence which has not been brought before it. I must lay stress that the powers accorded to the court under s. 425 of the CPC are entirely discretionary and the court cannot be forced to exercise them at the whims and fancies or at the bidding of any of the parties. A judicial discretion can never be exercised at gun point, so to speak, but it must be exercised according to the tenets of reasonableness by a judge with the correct judicial temperament (*Noor Mohd. v. Imtiaz Ahmad* AIR [1942] Oudh 130, 132). There must not, however, be a miscarriage of justice just because some particular witness has not been called. A witness who is recalled does not become a court witness. He remains throughout as the witness of the party which first examined him and his subsequent evidence is only a continuation of his earlier evidence (*State v. Bhanuprasad Shyamlal Joshi* AIR [1967] Bom. 378). Thus, Zulkifli remains throughout as the prosecution witness. The court too has an inherent power to recall a witness if it is satisfied that the witness is prepared to give evidence which is materially different from

what he had given at the trial. But if there is no material upon which the court could be satisfied, then the court is entitled to refuse the application to recall that witness (*Mohd Hussein Umar Kochra v. K.S. Dalipsinghji* AIR [1970] SC 45). The court is not empowered under the CPC to direct the prosecution to examine certain witnesses as prosecution witnesses. But the court under s. 425 of the CPC is empowered to examine witnesses as court witnesses, if necessary (*State of Gujarat v. Manzoorali Alibax* [1985] 1 Crimes 542). The crucial point would be that it is essential to the just decision of the case (*Jagdish Chander v. State of Haryana* [1983] Cr. LJ 235). The case of *Public Prosecutor v. Loh Keng Koh* [1967] 1 MLJ 97 was a case where at the close of the case for the prosecution, the prosecution offered certain witnesses to the defence. Some of these witnesses were called by the defence and the prosecution then applied to cross-examine them. But the magistrate refused to allow the prosecution to do so and he acquitted and discharged the respondent accused. Chang Min Tat J who decided the appeal ruled that there was no justification to exclude the right of the prosecution to examine witnesses for the defence and his Lordship held that the exclusion of such examination had caused a miscarriage of justice and the order of acquittal by the magistrate was set aside and a re-trial ordered.

The law is clear. It permits the recalling of a witness whenever it is essential to the just decision of the case. The mere recalling of a witness by itself can never constitute an irregularity irrespective of the exigencies of the situation (*Public Prosecutor v. Boo Chew Hia* [1963] MLJ 33) and the discretion exercisable under s. 425 of the CPC would depend on the facts of each case (*Ramli bin Kechik v. Public Prosecutor* [1986] 2 MLJ 33). The case of *Harbhajan v. State of MP* [1989] Cr. LJ 2205 (MP) lays down the proposition that the trial court can recall the witnesses if it is necessary to do so in the ends of justice. When the trial court considers recalling a witness is essential to a just decision of the case the appellate court will not interfere with the exercise of that discretion (*Public Prosecutor v. Abdul Rahim bin Abdul Satar* [1990] 1 CLJ 840; [1990] 3 MLJ 188).

All these principles of law were not advanced by either party and each party takes an easy way out by adopting the attitude of one applying and the other conceding. Be that as it may, I allowed the application to recall Zulkifli as it was essential to the just decision of the case. The life of the accused may depend on it.

On being recalled by the defence, this was what Zulkifli said: When he examined the white plastic bag (P8) in the presence of the accused at the front compound of the said house, he did ask the accused in regard to the contents of the white plastic bag (P8) and the accused responded by saying "candu". That was the only thing which the accused said, according to Zulkifli.

This piece of evidence must have startled the learned defence counsel for he quickly put to Zulkifli that the accused replied that his friend brought him and he did not know what was inside the white plastic bag (P8). To this suggestion Zulkifli categorically said that it was not true and that the accused merely replied: "only candu". Zulkifli too disagreed that when the accused was arrested he was wearing a dark blue vest. Zulkifli too disagreed that when he arrested the accused, he (Zulkifli) was wearing a singlet and a long trouser. The learned deputy public prosecutor was then accorded the right to re-examine Zulkifli and the latter testified that when the accused said that the white plastic bag (P8) contained candu, Zulkifli himself had yet to examine the contents of the white plastic bag (P8) and, consequently, did not know or was ignorant as to its contents.

Chief Inspector Hj. Zahari bin Ismail ("Zahari") was the last prosecution witness. He testified that on 3 May 1997 at 10pm while he was in his office Zulkifli handed to him a police report *vide* Larkin report number 1267/97, a search list relating to that police report, a white plastic bag (P8), two unsealed brown coloured envelopes (P9 and P10), two white plastic packets (P11 and P12) which was filled to the brim with the suspected heroin. He then marked the exhibits and put his signatures on them, of course not on the suspected heroin itself but rather on P11 and P12. On all these exhibits, Zahari too put the dates 3 May 1997 on them. Having done all these he then kept the exhibits together with the suspected heroin under lock and key. Zulkifli too told Zahari that the accused had been kept in the lock up.

On 4 May 1997 at 12.30pm, Zahari directed the police photographer (Lance Corporal Mazlan bin Md Zain) to take three photographs of the exhibits as reflected in P5A, P5B, and P5C. It was an activity involving the two of them and the exhibits were handled and arranged by Zahari solely who then kept the exhibits under lock and key after the photography session.

On 4 May 1997 at 1pm, Zahari proceeded to the scene of the crime with Zulkifli and the police photographer and with the assistance of Zulkifli who pointed out the pertinent places, Zahari directed the police photographer to take four photographs of the scene namely, P6A, P6B, P6C and P6D. According to Zahari, Zulkifli explained to him that the white plastic bag

(P8) containing the suspected heroin was picked up by Zulkifli on the floor of the front compound of the said house near to the chicken coop.

On 6 May 1997 at 10.15am, Zahari packed and sealed all the exhibits for onward transmission to the government chemist. When Zahari sent the exhibits to the government chemist for analysis, he received an acknowledgment receipt as reflected in P7. In due course, the government chemist confirmed the offending exhibits as dangerous drugs comprising of 3.7 grammes heroin and 53.9 grammes monoacetylmorphines. Zahari was quite a meticulous man for he took pains in ensuring the movements of the exhibits were well accounted for.

According to Zahari he began investigation on 5 May 1997 when he handed the accused to DSP Suraji bin Hj Abdul Hamid ("Suraji") for the cautioned statement to be recorded. Zahari testified that he received the exhibits on 23 July 1997 at 9am from the government chemist after the analysis had been conducted. These exhibits bore the seals of the government chemist and Zahari kept these exhibits under lock and key and he was responsible in maintaining its safe keeping. On 28 July 1997 at 10am Zahari registered the sealed exhibits bearing the chemist seals with the storekeeper – one Lance Corporal Jagjit Singh a/l Narajan Singh and the register book (P4) bore the relevant details. In the course of his investigation, Zahari ascertained that on the date of the offence the said house belonged to that Indian woman.

Zahari categorically and with ease identified all the exhibits in court and he too said that Larkin police report *vide* 1267/97 was lodged by Zulkifli in regard to the arrest of the accused.

Under cross-examination, Zahari testified that he went to the said house which was in a housing estate on a Sunday, 4 May 1997, and on that day there were not many people in the vicinity of the area. In front of the said house was the main road. On 5 May 1997 at about 10.30am, Zahari requested Suraji to record the cautioned statement of the accused. After recording the cautioned statement of the accused, Suraji handed it to Zahari who kept it in the investigation paper. That investigation paper was not kept by Zahari. According to Zahari the investigation paper was held by the learned deputy public prosecutor. Zahari was shown a photostat copy of the cautioned statement of the accused and he identified it to be so. The original of the cautioned statement kept by the learned deputy public prosecutor was then marked as exh. D14. Zahari admitted that as an investigating officer he has to investigate any information relayed to him by either the complainant or the accused. Zahari was shown the cautioned statement of the accused marked as D14 and he admitted having read it

and he too said that the name of Nasir was mentioned in the cautioned statement. Zahari admitted that he did investigate the personality known as Nasir.

When cross-examined, Zahari did not agree that the name of Nasir was also known as Ninin. Of crucial importance was the assertion of Zahari under cross-examination to the effect that his investigation revealed that there was no such personality by the name of Nasir. To Zahari, Nasir did not exist. Zahari disagreed that his investigation was incomplete. It was put to Zahari that he did not investigate a personality by the name of Nasir. Zahari denied this categorically. It was also put to Zahari that the exhibits tendered in court were not the ones handed by Zulkifli to him nor were they the ones seized by Zulkifli and Zahari categorically denied these suggestions. Zahari was cross-examined and he testified that after he had read the cautioned statement of the accused, he came across the name of Nasir, and, consequently, he had recorded further statements from all the police witnesses involved in the arrest of the accused in regard to the personality known as Nasir and all the police witnesses said that Nasir did not exist at all and that only the accused was at the scene of the crime when he was arrested. Zahari said that he only recorded the statements of police personnel in regard to Nasir and he (Zahari) did not proceed to record the statements of members of the public in regard to Nasir. Even though Nasir was said to stay at Taman Perling, Zahari could not trace Nasir as the particulars provided were insufficient. The address and the name of the road in Taman Perling were not supplied in the cautioned statement.

There was no re-examination of Zahari.

In the interest of justice, the court felt compelled to ask Zahari. To a question by the court, Zahari testified that in regard to the Chinese individual that was mentioned in the cautioned statement of the accused, an investigation was undertaken by him and he concluded that the Chinese individual did not exist, a mere concoction. Zahari proceeded further to say, upon being questioned by the court, that he recorded further statements from all the police witnesses in regard to the Chinese individual as mentioned in the cautioned statement of the accused and all the police witnesses gave negative replies to the effect that the Chinese individual as mentioned in the cautioned statement did not exist, a mere concoction and a fabrication.

The prosecution then closed its case and offered Kassim, Razak and Yassin. The defence refused the offer and these witnesses were forthwith released.

The sum total of the prosecution's case was cut and dry. It was a pure case of the accused caught red-handed to have in his custody or under his control the white plastic bag (P8) which contained the dangerous drugs as per the charge as alluded to in the early part of this judgment. The physical possession of 3.7 grammes heroin and 53.9 grammes monoacetylmorphines brought into sharp focus the presumptions under the Act. Under s. 37 (d) of the Act, the accused shall be deemed to have in his possession such drug and to have known the nature of such drug, until the contrary is proved. As the quantum of the monoacetylmorphines was 53.9 grammes, by virtue of the provisions of s. 37(da)(iii) of the Act, the accused shall be presumed, until the contrary is proved, to be trafficking in the said drug. Notwithstanding the fact that it was put to Zahari that the exhibits tendered in court were not the ones handed by Zulkifli to him nor were they the ones seized by Zulkifli, yet Mr. Hanif Hassan for the accused unabashedly conceded that the prosecution succeeded in establishing a *prima facie* case against the accused and agreed that the defence should be called. This meant that the burden shifted to the accused to rebut the presumptions on the balance of probabilities. Section 180 of the CPC was amended by the Criminal Procedure Code (Amendment) Act 1997 (Act A979) and that amendment came into effect on 31 January 1997 and it would apply to the present case. That section as amended enacts as follows:

(i) When the case for the prosecution is concluded, the court shall consider whether the prosecution has made out a *prima facie* case against the accused.

(ii) If the Court finds that the prosecution has not made out a *prima facie* case against the accused, the Court shall record an order of acquittal.

(iii) If the Court finds that a *prima facie* case has been made out against the accused on the offence charged the Court shall call upon the accused to enter his defence.

and it provides for a *prima facie* standard of proof at the close of the case for the prosecution.

The original text of s. 180 of the CPC enacts that when the case for the prosecution is concluded the Court, if it finds that no case against the accused has been made out which if unrebutted would warrant his conviction shall record an order of acquittal, or, if it does not so find, shall call on the accused to enter on his defence. In a nutshell, prior to the amendment to s. 180 of the CPC, the duty on the prosecution at the close of the case for the prosecution was to make out a case which if unrebutted would warrant a conviction. Obviously the effect of the amendment to s. 180 of the CPC was born after the decision of the Federal Court in

Arulpragasan a/l Sandaraju v. Public Prosecutor [1996] 4 CLJ 597; [1997] 1 MLJ 1 where the majority view was that the duty of the prosecution at the end of its case was to prove its case beyond reasonable doubt. *Arulpragasan* examined critically the two famous cases of *Haw Tua Tau v. Public Prosecutor* [1981] 1 CLJ 123; [1981] 2 MLJ 49 and *Khoo Hi Chiang v. Public Prosecutor* [1994] 2 CLJ 151; [1994] 1 MLJ 265. *Haw Tua Tau* enunciated a minimal evaluation of the evidence at the close of the case for the prosecution to ensure that it was not inherently incredible and this very test was adopted by the then Federal Court in *A. Ragunathan v. Pendakwa Raya* [1982] 1 CLJ 25; [1982] 1 MLJ 139 and by the then Supreme Court in *Munusamy v. Public Prosecutor* [1987] 1 MLJ 492. *Khoo Hi Chiang* rejected outright the test enunciated by *Haw Tua Tau* and ruled that at the close of the prosecution's case the court was to undertake not a minimal evaluation of the evidence as adduced by the prosecution but rather a maximum evaluation of such evidence in order to determine whether or not the prosecution had established the charge against the accused beyond all reasonable doubt. The present case dealt with an offence allegedly committed on 3 May 1997, well after the date of the amendment to s. 180 of the CPC. This court needs only to apply the *prima facie* standard of proof at the close of the prosecution case.

Incidentally, the amendment to s. 180 of the CPC has no retrospective effect (*Bahruni bin Ismail v. Pendakwa Raya* [1997] 3 CLJ 267; [1997] 2 MLJ 265 and *Dalip Bhagwan Singh v. Public Prosecutor* [1997] 4 CLJ 645; [1998] 1 MLJ 1) and there are two ways about it.

In his defence, the accused testified under oath and he stated that he entered Malaysia in January 1997. He hailed from Rangoon, Myanmar, married with two children. In Johor Bahru, he stayed with an adopted brother at Taman Dayang and worked in a coffee shop near Kempas, Johor Bahru. The accused categorically stated that he was arrested on 3 May 1997 at about 3pm. At 11am of the same day, the accused proceeded to an Indian temple at Johor Bahru to meet a friend known as Nasir and who was also known as Ninin. It was Nasir who suggested that meeting and Nasir had used his friend's handphone to call the accused. As agreed, the accused used his adopted brother's motorcycle to meet Nasir at 11am of that day (3 May 1997). The name of the accused's adopted brother was said to be Zuhaimi. The accused had known Nasir about three month's earlier and when the accused met Nasir at the appointed place, Nasir invited the accused to accompany him (Nasir) to purchase a handphone. Nasir was said to be fat, fair skinned and approximately 5 feet 7 inches tall. Nasir was said to be an Indonesian. It was said that Nasir stayed at Taman Perling and the accused's adopted brother, a Malay, stayed at

Taman Dayang. The accused also had an Indonesian adopted sister known as Hamidah who stayed at JKR. According to the accused his adopted sister had a husband by the name of Sumawi bin Sadino.

It seemed that the accused had a handphone and he took along that handphone when he met Nasir in front of the Indian temple. The accused showed his handphone to Nasir but the latter was not interested in that handphone and planned to purchase a handphone somewhere else. For this purpose, both of them wanted to use the motorcycle but they discovered that the motorcycle could not be used. It was spoilt. It could not be started. According to the accused the motorcycle collided with another motorcycle and that accident happened about three to four days before his arrest. That accident took place in the vicinity of Pelangi area and the rider of the other motorcycle was a Malay individual. As a result of that collision, the accused sprained his knee and he sought traditional treatment.

The accused has yet to recover fully from the accident. It seemed that the rider of the other motorcycle also sustained an injury and had demanded monetary compensation but the accused could not oblige. Since both of them sustained injuries, the accused was reluctant to make any monetary compensation to the rider of the other motorcycle. According to the accused, the rider of the other motorcycle was angry and he swore revenge by uttering the following words:

Aku akan kenakan kau satu hari nanti. (One day, I will put you in trouble)

Nasir and the accused then boarded a taxi to proceed to the accused's adopted brother's house to borrow a car and, on the way, the taxi dropped Nasir at the Larkin bus stand while the accused proceeded straight to Taman Dayang. Upon arrival at Taman Dayang, the accused managed to borrow a motorcar belonging to his adopted brother with the consent of the adopted brother's wife. At that time the adopted brother was asleep. It was a Toyota Corolla DX, red in colour, bearing number plate JAG 8901. Using the Toyota Corolla the accused proceeded to the Larkin bus stand and there he met Nasir who boarded the motorcar and both of them proceeded to the football field near the JKR. This was Nasir's idea and it was for the purpose of meeting Nasir's friend. But since Nasir's friend was not there, Nasir directed the accused to drive back to the Larkin bus stand. The accused complied. At Larkin bus stand, the accused stopped the motorcar as instructed by Nasir. Both of them then alighted from the motorcar. While the accused was standing next to the motorcar, the accused saw Nasir board another motorcar, a Wira, which was driven by a Chinese individual and that motorcar then left the Larkin bus stand. According to the accused he parked his adopted brother's motorcar by the side road

known as Jalan Pujaan which was near the Larkin bus stand. The accused waited patiently. About four minutes later, Nasir returned in that Wira motorcar driven by the Chinese individual. According to the accused as Nasir alighted from that Wira motorcar, Nasir was seen by the accused holding a white plastic bag. Nasir then invited the accused to follow him (Nasir) to a nearby restaurant. The accused merely complied. In the meantime, that Wira motorcar left the scene as soon as Nasir alighted from it.

As Nasir and the accused walked towards the restaurant, Nasir was still holding that white plastic bag in his hand. At that time Nasir told the accused to run fast as they were chased by some people. The accused turned around and saw a male individual wearing a singlet was tying his shoe lace in a house that was located behind the accused. The accused thought that that male individual was a friend of the motorcyclist that had collided into him sometime ago. The accused testified that he felt there were other people but he could not determine the number and the accused was able to identify the person who wore the singlet as slightly fair and tall. At that time according to the accused he was wearing a white long sleeved shirt, dark blue vest and a green trouser. Nasir, on the other hand, was wearing a white short sleeved T-shirt. According to the accused he was wearing the same dark blue vest like the one he was wearing in open court while seated in the witness box and that dark blue vest was in due course marked as exh. D15. The accused identified the photographs at P6A to P6D as the photographs depicting the scene of the crime. The accused marked with an alphabet "V" on photograph P6A to indicate his location when he first saw that male individual tying the shoe lace. The accused could not identify the house where that male individual was first sighted and he approximated that the house was located some five to six houses away from the point "V" in photograph P6A. The accused reiterated that he parked the Toyota motorcar at Jalan Pujaan. He too reiterated that when Nasir asked him to run, he had looked behind and saw the person in a white singlet and he tried to run slowly as his leg was hurt in the direction of the "mamak" (Indian) restaurant. The accused entered the said restaurant through the front door and made an exit through its rear door. The accused testified that as he was running, Nasir was holding the white plastic bag. The accused said that he was not holding the white plastic bag and Nasir too did not allow him to hold onto that white plastic bag. As the accused went out of the said restaurant through its rear door, he proceeded along the back lane of the said restaurant and as he reached the end of that back lane, a fat man held his hand and assaulted him and told him not to run again. At about the same time, the man wearing the white singlet arrived and introduced himself as a policeman by showing his warrant card and

thereafter the accused was handcuffed. The accused elaborated that as he was approaching the said restaurant, Nasir crossed the road and ran in the direction of the school. According to the accused, the fatman arrested him, and this was followed by the man in white singlet. A third person then arrived at the scene while he saw two other persons giving chase to Nasir across the road. According to the accused he could identify the fatman and the man that wore the singlet. The accused did not know that the latter was a policeman and he only knew after he was arrested. After his arrest, the accused was taken to the front portion of the said restaurant and there he saw other persons, presumably policemen.

According to the accused, he was escorted by the policemen to go to the motorcar and in so doing they proceeded past house no: 28, Jalan Dato' Jaafar, Larkin Garden and he heard them said: "Patah balik, patah balik, ini rumah dia" (Retreat, retreat, this is the house). They then proceeded to the said house and entered the compound of the said house and it was at this time that the accused saw the man in the white singlet holding in his hand the white plastic bag. At that time, the accused said that he was punched, and he was asked as to the contents of the white plastic bag. The accused replied: "Saya tidak tahu" (I do not know). The accused also testified that he was asked as to who had thrown the white plastic bag and he replied:

> Saya tidak tahu tetapi saya cuma nampak plastic putih ini dipegang oleh kawan saya Nasir.
>
> (I do not know but I saw the white plastic was held by my friend, Nasir.)

The accused denied that he had said that the white plastic bag contained "candu". They assaulted the accused further and finally they took out the contents of the white plastic bag and showed it to the accused and asked:

> Apakah barang ini ?
> (What is this thing ?)
>
> The accused responded: Saya tidak tahu
> (I do not know.)
>
> And the man said: Barang ini adalah dadah
> (This thing is drug.)
>
> The accused then echoed: Kalau Encik cakap dadah ini dadah lah
> (Mister, if you say it is drug, so it is.)

The accused denied that the plastic bag belonged to him. At the time of the incident, the surrounding area was not quiet as there were motorists plying along that road and there were people seen walking on the streets.

Exhibit P8 was shown to the accused and he remarked that he could not be certain that this was the bag but it was true that the plastic bag was white in colour. The accused said that he did not throw anything anywhere and that he only held the car keys in his hand.

The accused said that from the said house he was taken to the office of the police personnel. After attending court on several occasions, the accused was able to identify the man that wore the singlet as Zulkifli. The accused too agreed that Zulkifli had given evidence on two occasions. The accused also testified that he gave a cautioned statement as reflected in exh. D14. The accused said that he only knew that Nasir stayed at Taman Perling but he did not know the house number nor the name of the road. According to the accused, Nasir was an employment agent who found jobs for the Indonesians. The accused also said that Nasir was with him at that time.

Under cross-examination, the accused stated that he used to work in a "mamak" (Indian) restaurant and that prior to his arrest he had been to Jalan Pujaan as there were friends there who hailed from Myanmar. From the photographs, Larkin bus stop could not be seen and Nasir followed that Chinese individual to the Larkin bus stop in the Wira motorcar that was driven by the Chinese individual. According to the accused, the location of Larkin bus stop was opposite that of Jalan Pujaan. The accused saw Nasir alight from the Wira motorcar when the accused was leaning against the Toyota Corolla motorcar which was parked at the end of Jalan Pujaan. As the Wira motorcar moved away from the scene, Nasir crossed the road and approached the accused and together they then proceeded in the direction of the "mamak" (Indian) restaurant. About two to three feet before reaching the point "V" as shown in photograph P6A, was approximately the place when Nasir asked the accused to run as they were being chased. The accused did look back to see whether there was someone chasing them and in doing so he merely saw someone in a white singlet hurriedly tying the shoe lace. So the accused ran slowly as he thought that that someone was the man who had sustained injuries as a result of a motorcycle collision involving the accused. It seemed that the accused also ran because he had no visa.

When questioned as to why the accused ran as the man in the white singlet was merely tying his shoe lace, the accused replied that Nasir asked him to run and then that man was seen hurriedly tying his shoe lace. The accused denied that he was not telling the truth and he said that he was

telling the truth. Nasir even ran before he could finish telling the accused to run away. It was put that the accused and Nasir ran when that man in a singlet was wearing his shoes. To this, the accused responded by saying that:

(1) he ran as he did not know who would chase him;

(2) he ran as he was afraid that the man who had collided into him on the motorcycle would be chasing him;

(3) he ran as he was afraid that the police might chase him.

The accused said that he could clearly see the face of the man who was tying the shoe lace as that man was looking at his direction. Nasir and the accused ran in the direction of the "mamak" (Indian) restaurant. According to the accused, Nasir ran faster than him as he had a leg injury. Nasir was chased by two male individuals and the accused did not know where these two persons came from. The accused only saw as he was about to enter the "mamak" (Indian) restaurant that two persons crossed the road and they were chasing after Nasir. The accused denied that he was not telling the truth in court. The accused first sighted the man with the white singlet some 15 feet away and he agreed that he could not run away and for that reason he entered the "mamak" (Indian) restaurant. It was then put that at the distance of 15 feet away, the accused could easily be arrested by the man in the white singlet. The reply was that the man was seen hurriedly tying his shoe lace and for that reason the accused entered the "mamak" (Indian) restaurant. From the point marked "V" in P6A that restaurant was about two houses away. The prosecution then put to the accused that what the accused said about having injured feet was not true. The reply was that his feet still hurt until today. The accused reiterated that while he was in that restaurant he saw Nasir run across the road chased by two persons. The accused was not certain whether Nasir boarded a bus. The prosecution then took a different course of action by putting to the accused the following:

(1) That while the accused was walking along Jalan Dato' Jaafar he was alone, but the accused denied this and said he was with Nasir.

(2) That at that time, while being at Jalan Dato' Jaafar, the accused was holding a white plastic bag. But this was flatly denied by the accused who said that he was positive that the white plastic bag was with Nasir.

(3) That exh. P8 was the white plastic bag that was held by the accused in his right hand. To this, the accused said that it was not true and that he was holding the keys to the car.

(4) That when Zulkifli approached the accused and identified his office, the accused was holding in his right hand the white plastic bag (P8). The accused denied this suggestion and he reiterated that he was holding the car keys and he further said that Zulkifli introduced his office after he (the accused) was arrested behind the mamak's (Indian) restaurant.

(5) That the accused ran after Zulkifli introduced his office. The accused said that this was not true and that the accused ran because Nasir said that someone was chasing.

(6) That while the accused was running, he held the white plastic bag (P8) in his right hand. To this, the accused disagreed.

(7) That the accused threw the white plastic bag (P8) into the front compound of house no: 28, Jalan Dato' Jaafar, Larkin Garden. The accused disagreed to this suggestion.

(8) After the accused threw the white plastic bag (P8) into the front compound of the said house, the accused ran towards the Indian restaurant. To this suggestion, the accused responded by saying that he was arrested behind the Indian restaurant.

(9) That the accused held in his right hand the white plastic bag (P8) containing two unsealed brown coloured envelopes (P9 and P10) and inside these two unsealed brown coloured envelopes were white plastic packets (P11 and P12) containing the suspected heroin (P13), and while so doing the accused ran and threw the white plastic bag (P8) with its contents as stated above inside the front compound of the said house. To these suggestions, the accused said they were not true.

(10) That the accused told Zulkifli that exh. P8 contained "candu". The accused responded by saying that this was not true.

(11) That the drugs that were seized belonged to the accused. The accused denied this.

(12) That the personality known as Nasir did not exist. To this, the accused said it was not true and that Nasir existed.

(13) That the accused's cautioned statement was a mere concoction and a fabrication. The accused responded by saying that it was not true. It was also put that the accused had 1 day odd after his arrest before he made the cautioned statement and he was thus able to concoct, fabricate and the contents thereof were untrue and a total lie. In regard to the Chinese individual and Nasir which the accused mentioned in the cautioned statement, the prosecution put to the accused that these were mere fabrications, a concoction, untrue and a total lie. To all these pertinent questions, the accused replied that they were not true.

(14) That the personality known as Nasir did not exist and it was a mere concoction. To this, the accused said that Nasir existed and he was also known as Ninin.

(15) The Chinese individual in the Wira motorcar did not exist and it was a mere concoction. The accused responded by saying that it was not true.

(16) The episode in regard to the motorcycle's accident at Taman Pelangi was a mere concoction. The accused responded by saying that it was not true.

(17) That the police party that arrested the accused did not attack nor assault the accused. In response the accused said that it was not true and that he was assaulted on three occasions. Firstly, behind the "mamak" (Indian) restaurant. Secondly, at house no: 28, Jalan Dato' Jaafar. Thirdly, at the office of the police by Kassim.

(18) To the question that the accused was arrested at 4pm on 3 May 1997, the accused replied that that was so and it was approximately 3pm to 4pm.

(19) That the story that the accused was threatened by the Malay motorcyclist that collided into the accused while the accused was riding a motorcycle at Taman Pelangi was nothing more than a mere concoction. To this, the accused replied that it was not a mere concoction and it was true.

(20) On the date of the incident, Zulkifli was not wearing a singlet but a T-shirt. The accused responded by saying that it was not true.

The accused testified that he did not lodge a police report in regard to the motorcycle's accident at Taman Pelangi because he had no valid travel document. He was, in his own words, an illegal immigrant in Malaysia.

Under re-examination, the accused explained that the distance between him and the man in white singlet was a mere approximation only, not accurate. The accused said he was uncertain that Nasir had boarded the bus because the accused was still running, but the accused agreed that at that time a mini bus was seen plying that area.

The accused called Sumawi bin Sagino ("Sumawi"), a permanent resident, as his supporting witness. Sumawi explained that in May 1997 he was staying at Kampung Serantau Baru, at Kebun Teh, Johor Bahru. He hailed from Indonesia and he came to Malaysia in 1979. He was already married and his wife's name was said to be Midah bte Mail. When Sumawi was staying at Kampung Serantau in 1997, he was operating a provision shop. He said he knew the accused. Initially the accused used to keep his crash helmet at Sumawi's house. He rarely saw the accused and he spoke to the accused on only one occasion. Sumawi said that he knew the accused had an Indonesian friend by the name of Ninin, and he used to see the accused with Ninin. To his knowledge that was the only name Ninin had. Sumawi described Ninin as big sized with fair skin. Now he said that he did not know where Ninin stayed. He also said that even then he did not know where Ninin stayed. Sumawi proceeded to testify that he used to see the accused with Ninin in front of his (Sumawi's) house. He also said that he used to see Ninin at Ngee Heng. Of importance was the assertion by Sumawi that he did not speak to Ninin at all, yet Sumawi knew that Ninin was from Boyan in Indonesia. Sumawi stressed that he himself came from Boyan in Indonesia. Sumawi also said that he knew Ninin while in Boyan.

Sumawi testified that he knew that the accused was arrested last year. Sumawi had the audacity to say that the police station had telephoned him and the police had told him that the accused was arrested. Sumawi said that he had a handphone and his handphone number was 0107731364. Sumawi said that he did not know but the police told him that the accused was arrested and the money which the accused borrowed had to be given back to his friend. Sumawi then handed the money and after that he did not know what had happened to that money. After the accused was arrested, Sumawi did not meet Ninin until now. After the accused was arrested, Sumawi too never met the accused. Sumawi did not visit the accused in prison. After the accused was arrested, the police did not record the statement of Sumawi. He said that Ninin was in existence.

Under cross-examination, Sumawi disagreed that his story about Ninin was not true. Sumawi did not lodge a police report in regard to Ninin. Sumawi too disagreed that the story that the police had telephoned him was not true. Sumawi, however, said that he was not involved in the drug case in which the accused was charged.

There was no re-examination of Sumawi.

In order to avoid a misdirection by way of a non-direction, I have to view the whole of the evidence objectively and from all angles. This was the warning sounded by Edgar Joseph Jr. SCJ (now FCJ) in *Gooi Loo Seng v. Public Prosecutor* [1993] 2 MLJ 137, 142:

> Clearly, therefore, the trial judge, was bound to, but did not view the whole of the evidence objectively and from all angles, with the result that the appellant had lost the chance which was fairly open to him of being acquitted. On this point, we consider that non-direction amounts to a misdirection, for in the words of Pickford J in *R. Bundy* 5 Cr. App R 270: '... the trial was not satisfactory, and the case was not put to the jury in a way to ensure their due appreciation of the value of the evidence'.
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> We must treat the failure of a trial judge sitting alone, to direct himself correctly in the same way as a failure to direct a jury correctly. In these circumstances, a miscarriage of justice may well have occurred.

Shaik Daud JCA speaking for the Federal Court in *Ganapathy Rengasamy v. Public Prosecutor* [1998] 2 CLJ 1 echoed the same sentiment at p. 9 of the report:

> We find there are many material questions left unanswered by the prosecution in this case and, coupled with the learned judge's failure to address material aspects of the defence's case, there has, in our view, been a serious misdirection by way of non-direction.

It is to avoid these pitfalls, that I have narrated the case for the prosecution and the defence of the accused in some detail. To the prosecution, this was a pure and simple case of physical possession of the dangerous drugs by the accused. The defence was one of denial and shifting the blame to Nasir entirely. The defence was saying that Nasir existed and Nasir was not a figment of the accused's imagination. It must be recalled that Zulkifli proceeded with the police party to the scene acting on an information received. Upon arrival, Zulkifli saw the accused walking alone and holding a white plastic bag (P8) containing the dangerous drugs as confirmed by the government chemist. At the time when Zulkifli and his police party saw the accused – walking alone and carrying the white plastic bag (P8) containing the dangerous drugs, it was argued by Mr. Hanif Hassan that

the police party failed to arrest the accused immediately. According to Mr. Hanif Hassan, the explanation of Huzaimi was totally unreasonable. Now, it would be opportune to examine Huzaimi's explanations. He explained that it would be a a normal practice for the police to apprehend a suspect in two ways:

(1) identify the office to the suspect; and

(2) examine the suspect.

Huzaimi further explained that the accused was only suspected of committing a single offence at that time. In fact, Zulkifli approached the accused and declared his office by showing his warrant card before proceeding to arrest the accused. But once Zulkifli identified his office, the accused bolted and while running was still holding onto the white plastic bag (P8) containing the dangerous drugs and the accused was then seen throwing the white plastic bag (P8) into the front compound of house no: 28, Jalan Dato' Jaafar. To say the least, the evidence of Zulkifli was materially corroborated by Huzaimi. It must be recalled that Huzaimi practically stood guard outside the said house after he saw the accused throw the white plastic bag (P8) inside the front compound of the said house. That Huzaimi stood guard like a hawk outside the said house after the accused was seen throwing that white plastic bag (P8) was hardly challenged by the defence. It was merely put to Huzaimi that he did not see the accused throw the white plastic bag (P8) inside the front compound of the said house and it was flatly and outrightly denied by Huzaimi. It is interesting to note that after the accused bolted with the white plastic bag (P8) containing the dangerous drugs in his right hand, Zulkifli and his police party did not remain idle. They gave chase and was in hot pursuit of the accused. To say that the police failed to arrest the accused immediately would be doing a disservice to Zulkifli and his police party. This was not a case like that of *Ganapathy Rengasamy v. Public Prosecutor (supra)* where "the target had been identified, was seen allegedly alone carrying a bag, was not immediately apprehended and later when the police personnel boarded the bus again saw the target and the bag and again not apprehended, lend credence to the appellant's defence that when he was walking towards the main road to board the bus he was not carrying the bag, and the bag was only given to him on the bus before he alighted. If he was so seen as claimed by SP3, the police would not have hesitated to apprehend him. The defence also lend credence to the assertion that appellant was in fact not the target but probably someone else. This someone else could well be Rahman who was in fact later arrested as a result of information given by the appellant. According to appellant Rahman

was in the bus that day" (per Shaik Daud JCA at p. 9 of the report). This was a case where the accused fitted the description of the information and where the accused was in physical possession of the dangerous drugs contained in exh. (P8) and when the police approached the accused, Zulkifli identified himself and the accused fled helter skelter still carrying exh. P8 containing the dangerous drugs, and where the accused was seen throwing exh. (P8) with its contents inside the front compound of the said house and a short while later the accused was arrested.

It was ingeniously argued by Mr. Hanif Hassan that when Zulkifli and Huzaimi saw the accused throw the white plastic bag (P8) with its incriminating contents inside the front compound of the said house, both these two police personnel merely observed and did nothing to arrest the accused. With respect, the facts indicated that Zulkifli, Huzaimi and the police party were chasing after the accused even before the accused was seen throwing the white plastic bag (P8) with its incriminating contents inside the front compound of the said house. It was entirely out of context to submit that Zulkifli, Huzaimi and the police personnel were passive observers who were not making attempts to arrest the accused. The scenario was like this:

(1) having sighted the accused as the target Zulkifli, Huzaimi and the police party approached the accused who was seen carrying the white plastic bag (P8) in his right hand which contained the dangerous drugs as confirmed by the government chemist;

(2) Zulkifli identified his office and the accused fled still holding onto that incriminating exh. (P8) and its contents;

(3) Zulkifli and his police party gave chase and the accused was seen throwing exh. (P8) with its damning contents inside the front compound of the said house while running;

(4) Huzaimi stood guard outside the said house keeping a watchful eye on the white plastic bag (P8) that was lying on the front compound of the said house;

(5) Zulkifli and the police party kept chasing after the accused which finally led to the apprehension of the accused; and

(6) that episode of chasing was done without a break contrary to what Mr. Hanif Hassan submitted. This was not a case of running, stopping and running as submitted by Mr. Hanif Hassan. This was a case of the accused running away with the offending exhibits to avoid arrest.

Undaunted, Mr. Hanif Hassan submitted that the prosecution failed to explain the roles of two policemen namely, Yassin and Razak and that being the case it was his submission that both Yassin and Razak were chasing after someone else and that someone else must be Nasir as the defence wanted this court to believe. The evidence indicated that Zulkifli and his police party comprising of Huzaimi, Kassim, Yassin and Razak gave chase to the accused who was carrying that incriminating exh. (P8) and when the accused threw (P8) inside the front compound of the said house it was Huzaimi who stood vigil outside the said house. Zulkifli testified that the chase continued with him spearheading the chase accompanied by Kassim, Yassin and Razak; and Zulkifli was quite categorical on this point. The notes of evidence bore out this testimony and according to Zulkifli once the accused was arrested it was Kassim that handcuffed the accused while Yassin and Razak guarded the accused. Thus, all along Yassin and Razak were with Zulkifli and Kassim and they continued chasing after the accused while Huzaimi stood guard outside the said house keeping a watchful eye on the white plastic bag (P8) that was thrown by the accused. This was my judgment and I so hold accordingly.

In regard to Huzaimi, Mr. Hanif Hassan submitted and in the course of which questioned the conduct of Huzaimi who was waiting outside the said house keeping an eye on that white plastic bag (P8). Why, so submitted Mr. Hanif Hassan, did Huzaimi not enter the compound of the said house and pick up the white plastic bag (P8) containing the dangerous drugs? Since this was not done by Huzaimi, Mr. Hanif Hassan implored this court to regard Huzaimi as not stopping in front of the said house and was in fact chasing after the accused together with Zulkifli, Kassim, Yassin and Razak. With respect, I cannot simply disregard the evidence of Huzaimi when he testified that after seeing the accused throw the white plastic bag (P8) containing the dangerous drugs inside the front compound of the said house, he stopped chasing after the accused and stood guard outside the said house keeping an eye on (P8). That was a prudent thing to do. A good strategy. If Huzaimi entered the compound of the said house and picked up the white plastic bag (P8) containing the dangerous drugs as suggested by Mr. Hanif Hassan in his submission, then the defence could easily submit with some measure of success that Huzaimi planted those dangerous drugs in the white plastic bag (P8) in order to fix up the accused. I reject the submission of Mr. Hanif Hassan. I accept the evidence of Huzaimi that he stood vigil outside the said house guarding the white plastic bag (P8) for a span of five minutes until Zulkifli returned with the police party and the accused who was by then arrested and handcuffed. Zulkifli too testified that after the accused was arrested, he and the rest of the police party

returned to the said house and saw Huzaimi waiting outside the said house and this piece of testimony put to nought the submission of Mr. Hanif Hassan. It must be recalled that under cross-examination Zulkifli testified that no one directed Huzaimi to wait outside the said house. Huzaimi too, it seemed, must have acted out of a sheer sense of police duty. He nonchalantly said that he stopped chasing the accused and guarded the said house after he saw the accused throw the white plastic bag (P8) inside the front compound of the said house. It was a mere five minutes' vigil for Huzaimi to keep a watchful eye on the white plastic bag (P8) lying on the front compound of the said house. It was quite reasonable for Huzaimi to have acted the way he did. Had that wait been a five hour wait, then it would certainly be unreasonable to expect Huzaimi to wait that long. The defence attempt to challenge this part of the evidence of Huzaimi can best be summed up as an exercise in futility.

On the date of the arrest, the version of the accused was that he was not alone as alleged by the prosecution but rather he was with Nasir. According to the accused, it was Nasir who requested the accused to obtain a motorcar in order to go to Larkin bus stand to meet Nasir's friend. Accused managed to borrow a motorcar from his adopted brother and with it he brought Nasir to the Larkin bus stand. Upon arrival, the accused parked the motorcar at Jalan Pujaan and Nasir then alighted from the motorcar to meet one Chinese individual who drove a Wira motorcar. Nasir was said to have accompanied that Chinese individual in the Wira motorcar and when he returned Nasir was said to be carrying a white plastic bag (P8). The Chinese individual then left the scene. Nasir then invited the accused to follow him (Nasir) to the Indian restaurant and the accused merely complied. According to the accused, both he and Nasir walked along Jalan Dato' Jaafar to go to that Indian restaurant. At the material time, according to the accused, Nasir was holding that white plastic bag (P8) while the accused was holding the car keys in his right hand. As they were walking, the accused suddenly heard Nasir asking him to run. The accused turned his head and saw Zulkifli tying his shoe lace and the accused associated Zulkifli with the motorcyclist who had threatened him harm as a result of a motorcycle accident at Taman Pelangi. According to the accused, he was unable to run fast as his leg was injured. The accused denied that he threw the white plastic bag (P8) inside the front compound of the said house. The accused testified that he ran towards the Indian restaurant and there he was arrested. The accused also testified that he saw two policemen chase after Nasir who had since crossed the road.

In short, the defence was that the accused was not walking alone on that day and neither was he holding a white plastic bag (P8) containing the dangerous drugs. The accused said that he did not throw the white plastic bag (P8) into the front compound of the said house. According to the accused, it was Nasir that carried the white plastic bag (P8) and that when Nasir alighted from the Wira motorcar driven by the Chinese individual, Nasir was seen by the accused holding a white plastic bag. But alas, the existence of the Chinese individual was not put across to the prosecution witnesses. Zulkifli, Huzaimi and Zahari were not cross-examined at all about the Chinese individual. This blatant failure would be fatal. Eliciting answers in favour of the opposite party and weakening the evidentiary value of a witness are the objects of cross-examination. Section 138(2) of the Evidence Act 1950 provides that the examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief. Sharma J in *Re Pichi Muthu* [1970] 2 MLJ 143 had this to say on the effect of the failure to cross-examine a witness:

> The learned president had misdirected himself in ignoring and overlooking the evidence of PW1 and PW2 and the total lack of any cross-examination of these witnesses touching the defence which was subsequently suggested for the first time only when the defence was called.

It was held in *A.E.G. Carapiet v. A.Y. Derderian* AIR [1961] Cal 359, *inter alia*, that:

> Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. This is not merely a technical rule of evidence. It is a rule of essential justice. It serves to prevent surprise at trial and miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party on whose behalf the cross-examination is being made comes to give and lead evidence by producing witnesses. This much a counsel is bound to do when cross-examining that he must put to each of his opponent's witnesses in turn, so much of his own case as concerns that particular witness or in which that witness had any share.

Lord Chancellor Herschell in *Browne v. Dunn* [1893] 6R 67, at p. 70, observed:

> Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact, by some questions put in cross-examination showing that the imputation is intended to be made, and not to take his evidence

> and pass it by as a matter altogether unchallenged and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses.

To sum up the law, a skilful criminal lawyer must hear and heed the evidence in examination-in-chief with diligence, and when his turn comes he should interrogate the witness on all material points that go against him. To decline to avail himself of the opportunity to put his essential and material case in cross-examination would hinder the strength of the defence case and it means that the defence believes the testimony of the prosecution witness, which testimony could not be disputed at all. If the defence asks no question, he will be taken to accept the witness's account: *Flanagan v. Fahy* [1918] 2 IR 361, 388-89 CA.

Mahadev Shankar J (as he then was) in his article entitled *"Putting and Suggesting in Cross-Examination"* [1984] 1 MLJ xi said:

> It is well established that when matters are 'put' in cross-examination by defence counsel it is implied that positive evidence will be called to prove the matters put. On the other hand where all that is done is to 'suggest' to a witness that a fact is not so, then what is meant is that the assertions of the witness are inherently incredible but that no positive evidence will be called to contradict the statement.

His Lordship proceeded further to say in his article at p. xv:

> But as the law stands today, it may not be too far-fetched to say that a lawyer who does not put his case to his adversary's witnesses at the first opportunity, must so act at his peril.

In *Wong Swee Chin v. Public Prosecutor* [1981] 1 MLJ 212, 213 the Federal Court speaking through Raja Azlan Shah CJ (as His Majesty then was) said:

> On this point we need only say there is a general rule that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony. But as is common with all general rules there are also exceptions as pointed out in the judgment of the Supreme Court of New Zealand in *Transport Ministry v. Garry* [1973] 1 NZLR 120, 122 where Haslam J said at p. 122:

> In *Phipson on Evidence* 11th Edition paragraph 1544 the learned authors suggest examples by way of exception to the general principle that failure to cross-examine will amount to an acceptance of the witness's testimony, *viz* where '... the story is itself of an incredible or romancing character, or the abstention arises from mere motives of delicacy ... or when counsel indicates that he is merely abstaining for convenience, e.g., to save time. And where several witnesses are called to the same point it is not always necessary to cross-examine them all'.

The same view was adopted and vigorously applied in *Public Prosecutor v. Abang Abdul Rahman* [1982] 1 MLJ 346, 348. Even the civil procedure imposes the need to put one's story to the other side during cross-examination. Thus, Thomson LP in *Seng Chong Metal Works Ltd. v. Lew FA* [1966] 2 MLJ 63 succinctly said:

> Mr. Cashin put it to us that there was a possibility that he was, as it were, lounging against the machine and his hand slipped in. Of course that is a possibility. Everything is a possibility. But there was the plaintiff's own evidence which was not contradicted that he was operating the machine and the hypothesis advanced by counsel was not put to him in cross-examination; it was something, as I understand Mr. Cashin to have said, that he put to the judge in the course of argument.

The same approach was also adopted by Gill J in *Shamsudin v. Yap Choh Teh & Anor* [1969] 1 MLJ 26, 28 where his Lordship said:

> As was pointed out by counsel for the plaintiff, the plaintiff and his witness were not cross-examined on the question of the explosion after the all clear. Their story on that point in fact was not challenged. All that was put to the plaintiff was that he did not take the right type of cover for his own safety.

Syed Othman FJ in *Multar v. Lim Kim Chet & Anor* [1982] 1 MLJ 184, 185 said:

> As far as we can see, the appellant's evidence is consistent with his report and the sketch plan. His evidence as to how the accident occurred was not challenged.

Applying these principles of law to the present case, the failure of the defence to put the existence of the Chinese individual to the prosecution witnesses meant that the Chinese individual was non-existent, a mere fabrication and a mere concoction by the accused. It follows that the story that after meeting the Chinese individual, Nasir carried the white plastic bag (P8) was, to say the least, highly suspect.

As to the existence of Nasir, the prosecution held the view that Nasir was non-existent. A mere figment of the accused's imagination. Zulkifli and Huzaimi categorically said that the accused was alone at the material time and there was no one else apart from the accused. Even Zahari was quite categorical when he said that his investigation revealed only the accused as the sole culprit, the sole trafficker at the material time. The accused, on the other end of the scale, held vigorously to the view that Nasir was in existence and it was Nasir, and not the accused, that carried the white plastic bag (P8) that contained the dangerous drugs. The accused denied that he held the white plastic bag (P8) containing the incriminating exhibits and the accused too denied that it was he who ran and swung the white plastic bag (P8) and its contents inside the front compound of the said house. But somehow, the accused in putting the blame or shifting the criminal liability onto Nasir did not explain what Nasir did to the white plastic bag (P8) that contained the dangerous drugs when Nasir was running together with the accused. Zulkifli and Huzaimi were not cross-examined that it was Nasir that threw the white plastic bag (P8) containing the dangerous drugs inside the front compound of the said house, if it was really true that Nasir was the real culprit – the perpetrator of the crime, the sole trafficker of the day. The accused relied on his cautioned statement marked D14 to argue that Nasir really existed.

In the cautioned statement, the accused explained that after Nasir accompanied the Chinese individual in the Wira motorcar that travelled in the vicinity of the Larkin bus stop, Nasir then alighted from the motorcar and at that time Nasir was seen carrying a plastic bag. Nasir then invited the accused to follow him and the accused agreed. Before reaching a shop, Nasir told the accused to run as there was someone chasing. On hearing this, the accused ran. Nasir too ran across the road and boarded the bus. The accused was eventually arrested and brought to a house where the police recovered the plastic bag and showed it to the accused. The police asked him in regard to the contents of the plastic bag and the accused replied that he did not know and that his friend carried it. The accused provided the address of Nasir in the cautioned statement as near Taman Perling but the accused was unable to provide the house number and the name of the road. In his cautioned statement, the accused was asked as to whether he knew the contents of the plastic bag and the accused replied that he knew it was drug as the police had opened the plastic bag and told him that it contained drug. When asked whether the drug belonged to him, the accused said in his cautioned statement that the drug belonged to Nasir. It must be borne in mind that the cautioned statement was recorded on 5 May 1997 at 10.45am by Suraji whereas the accused was alleged to have trafficked in dangerous drugs on 3 May 1997 at about 4pm. There

was thus time for the accused to concoct his version as reflected in the cautioned statement. Calculation wise, it was after 1 day 18 hours 45 minutes later that the accused gave his cautioned statement. No wonder the prosecution cross-examined the accused and it was put to the accused that the cautioned statement was a mere concoction and a fabrication. The prosecution was entitled to criticise the contents of the cautioned statement and was entitled to say that the whole cautioned statement was a mere concoction, untrue and a total lie (*Public Prosecutor v. Mohamed Noor bin Jantan* [1979] 2 MLJ 289). Of significance were the criticisms by the prosecution in regard to the Chinese individual and Nasir that were mentioned in the cautioned statement as being mere fabrication, concoction, untrue and a total lie.

Of crucial importance would be the pertinent questions of whether Nasir and the Chinese individual alluded to by the accused in his defence and in the cautioned statement really existed and not mere figments of the accused wild imaginations. Zahari, the investigating officer, gave evidence on these points. The investigation by Zahari was quite thorough. Due recognition must be accorded to him. Having read the cautioned statement, Zahari did not remain idle. He proceeded to record further statements from all the police personnel involved in the arrest of the accused and the feedback was in the negative. Zahari testified that the policemen involved in the arrest of the accused categorically stated that Nasir and the Chinese individual did not exist at all. Only the accused was the sole culprit, the lone trafficker at the scene of the crime. As far as Zahari was concerned, he regarded Nasir and the Chinese individual as non existent. As I said, in cross-examining Zulkifli, Huzaimi and Zahari, the defence failed to put the existence of the Chinese individual to them. It must be recalled that Zahari responded to the questions by the court and he categorically stated that: (1) the existence of the Chinese individual as mentioned in the cautioned statement was investigated upon and the result was in the negative – the Chinese individual did not exist and was a mere concoction, (2) upon recording further statements from the police party involved in the arrest of the accused, all of them confirmed that the Chinese individual as mentioned in the cautioned statement did not exist; a mere concoction and a fabrication. Zahari proceeded further to trace Nasir but to no avail. Without the correct address and the name of the road in Taman Perling, Zahari could not trace Nasir. The cautioned statement merely stated that Nasir stayed at Taman Perling. Even in his defence, the accused also said the same thing without elaborating any further in regard to the address of Nasir.

This was a case where the accused concocted the existence of the Chinese individual and Nasir in his cautioned statement and in his defence. In my judgment, the Chinese individual and Nasir did not exist at all. These personalities were figments of the accused's wild imaginations. In my judgment, on the day when the accused was arrested, he was alone and it was he who carried and held the white plastic bag (P8) containing the dangerous drugs all along. It was also my judgment that the accused ran with the damning exhibits after Zulkifli introduced his office and in the course of fleeing from the long arms of the law, the accused threw exh. (P8) containing the dangerous drugs inside the front compound of the said house and fled for his dear life in the direction of the Indian restaurant where he was subdued and arrested.

Sumawi was the defence witness and his testimony revolved on the character known as Ninin. It was the defence contention that Ninin was in existence and Sumawi was called to confirm this fact. Briefly, Sumawi said that he knew the accused since the accused used to keep his (accused's) crash helmet with Sumawi. But surprisingly, Sumawi said that he rarely saw the accused and he spoke to the accused on only one occasion. Sumawi said that he knew that the accused has an Indonesian friend by the name of Ninin and that he used to see the accused with Ninin. To his knowledge that was the only name Ninin had and he did not know where Ninin stayed. He described Ninin as big sized with fair skin. Even though Sumawi said that he did not speak to Ninin at all, yet Sumawi knew that Ninin hailed from Boyan in Indonesia. Sumawi then told the court that he too originally came from Boyan in Indonesia and now has acquired a permanent resident status in Malaysia. Sumawi then ventured to say that he even knew Ninin while he was in Boyan, Indonesia. Sumawi then said that he knew that the accused was arrested last year and that the police station had telephoned him in regard to the arrrest of the accused. Sumawi then gave his handphone number. Sumawi testified that the police had told him that the accused was arrested and that the money which the accused borrowed had to be given back to his friend and Sumawi then complied and handed back the money and he did not know what had happened to that money. After the accused was arrested, Sumawi said he never met Ninin nor did he visit the accused in prison. Sumawi too said that the police did not record his statement and he said that Ninin was in existence. The prosecution cross-examined Sumawi and the latter disagreed that the story about Ninin was not true. Sumawi too disagreed that the story that the police had telephoned him was not true. Sumawi was quick to say that he was not involved in the drug case in which the accused was charged.

Who was the character by the name of Ninin? The accused in his defence said that Nasir was also known as Ninin. Zahari was cross-examined and he did not agree that the name of Nasir was also known as Ninin. When Zulkifli and Huzaimi were cross-examined, the names of Nasir and Ninin were not put to them at all. In fact, when Zulkifli was being cross-examined he was merely questioned in regard to "another male person". Huzaimi, on the other hand, was cross-examined in regard to "someone else".

In Malaysia, Sumawi testified that he did not even speak to Ninin at all. Sumawi said that Ninin hailed from Boyan, Indonesia which was also the country of origin of Sumawi. Sumawi said that he knew Ninin while in Boyan, Indonesia and if that was so why didn't he speak to Ninin when Ninin was in Malaysia, if at all he was in Malaysia and in existence. Having known Ninin in Boyan, Indonesia, the relationship between Sumawi and Ninin should be close, after all, Sumawi too came from that country. Yet Sumawi remained aloof and did not even speak to Ninin in Malaysia notwithstanding the fact that he said that he saw Ninin with the accused. Coming from the same country of origin as Ninin, Sumawi too only knew that Ninin had that name only. This meant that the evidence of Sumawi in regard to Ninin was highly suspect. Indeed if it was true that Sumawi knew Ninin then he should also know that Ninin also went by the name of Nasir. But this was not to be.

Sumawi had the audacity to say that the police telephoned him and told him in regard to the arrest of the accused. Why should the police relay the information to Sumawi about the arrest of the accused? There was no obligation on the part of the police to report to Sumawi about the arrest of the accused. Sumawi was and is not holding any position in the Malaysian Police Force. Sumawi, a permanent resident who hailed from Boyan, Indonesia, operated a provision shop while the accused was a self confessed illegal immigrant. It must be emphasised that there was no cross-examination of Zahari in regard to Sumawi particularly on the point that Sumawi knew a person by the name of Ninin and that the police had telephoned Sumawi to inform him about the arrest of the accused. The failure to put across the defence case was crucial and, in the circumstances, fatal. Indeed, if Sumawi knew about Ninin and could shed some light about Ninin, he should have lodged a police report about the whole matter and assist the accused in the name of justice. When the police telephoned him about the arrest of the accused, that was an opportune time for Sumawi to lodge a police report and assist the police in their investigation. Sumawi wanted this court to believe him when he said that the police had telephoned and told him about the arrest of the accused. Gullibility lies squarely on Sumawi and the accused.

In my judgment, Sumawi came to court and took the stand and told a pack of lies. It was also my judgment, that the character known to Sumawi as Ninin was non-existent. A mere figment of Sumawi's imagination. Ninin was not known as Nasir as the accused wanted this court to believe. Sumawi could not even tell this court that Ninin was also called Nasir. This was my judgment and I so hold accordingly.

The present case can easily be distinguished from the case of *Ganapathy Rengasamy v. Public Prosecutor (supra)*. The appellant in that case admitted carrying the brown bag that contained heroin but denied knowledge as to its contents and said that the brown bag with its contents belonged to one Rahman. It was a defence of an innocent carrier. Rahman was not an illusory character and there was evidence that the character Rahman was in existence. The investigating officer in the person of Inspector Saumi bin Man confirmed that Rahman was arrested and he was made available to the defence at the close of the prosecution's case. Inspector Saumi too confirmed that Rahman was charged for trafficking in 10 pounds of heroin and he was convicted and sentenced to death by the High Court. Inspector Saumi also confirmed that Rahman was arrested based on the information of the appellant. In his defence, the appellant said that the brown bag belonged to Rahman. Since the trial judge failed to give due consideration to the defence, the Court of Appeal allowed the appellant's appeal, quashed the conviction and set aside the sentence. The Court of Appeal then ordered that the appellant be acquitted and discharged.

Factually, the present case too was entirely different from that of *Mohamad Radhi bin Yaakob v. Public Prosecutor* [1991] 3 CLJ 2073; [1991] 3 MLJ 169. In that case the appellant was convicted by the High Court for trafficking in 544.18 grammes of cannabis and his defence was that Hashim was the owner of the bag containing the cannabis and that the appellant was merely an innocent and momentary carrier of the bag. The appellant's defence was, in short, that it was Hashim who was trafficking in the cannabis. The appellant in his defence called eight other witnesses to prove that Hashim really existed and the appellant succeeded in doing so. ASP Mohd Hanafiah from the anti-narcotics special branch testified that attempts to trace the whereabouts of Hashim was abortive. It was not disputed that at the time of the appellant's arrest, the appellant was in the company of Hashim and thus the character by the name of Hashim was not a fictitious person. The Supreme Court held that Hashim was in all probability the trafficker of the cannabis and, consequently, allowed the appeal by quashing the conviction and setting aside the death sentence. The Supreme Court, however, substituted conviction under s. 12(2) of the Act and imposed a prison term of five years.

In the context of the present case, Nasir did not exist. The police party involved in the arrest of the accused categorically stated that the accused was alone at the time of arrest. Zahari, the hardworking investigating officer, also confirmed that Nasir was non-existent and the accused was the sole trafficker of the day. The present case are poles apart from *Ganapathy Rengasamay v. Public Prosecutor (supra)* and *Mohamad Radhi bin Yaakob v. Public Prosecutor (supra).*

Reverting back to the recalling of Zulkifli, the evidence elicited from Zulkifli was indeed damning. The accused responded to a query by Zulkifli and the accused said that the white plastic bag (P8) contained "candu." This piece of evidence when seen in the context of the accused fleeing sounds logical. But the accused testified that he ran because:

(1) Nasir asked him to do so;

(2) he was afraid that the motorcyclist who collided into him at Taman Pelangi was chasing him since that motorcyclist had vowed to seek revenge; and

(3) he was afraid that the police might chase him.

The accused admitted that when Nasir told him to run, he turned back and saw Zulkifli tying his shoe lace and if that was so why should the accused run because at that time Zulkifli was in plain clothes and Zulkifli had yet to introduce his office. In all probability, the accused fled after he heard Zulkifli introducing his office and the accused fled because he knew he was carrying the offending exhibits in exh. P8. This was my judgment and I hold accordingly. It was essential to the just decision of the case to recall Zulkifli notwithstanding the fact that the defence did not advance a reason for recalling Zulkifli. On the meaning to the word 'possession', reference should be made to the case of *Leow Nghee Lim v. Reg* [1956] 22 MLJ 28, where Taylor J had this to say at p. 30:

> A man must know of the existence of a chattel and have some idea of its whereabouts before he can exercise any control over it. The word possession therefore implies some knowledge but not necessarily full or exact knowledge.

Further down the judgment, at p. 31, his Lordship continued:

> The word 'possession' is a vague and general word which cannot be closely defined. Without at least general knowledge there cannot be possession but there can be possession without full and exact knowledge.

Applying the *Radhi* direction as enunciated by Mohamed Azmi SCJ in *Mohamed Radhi bin Yaakob v. Public Prosecutor (supra)*, I have embarked on a separate exercise in regard to the presumptions in ss. 37(d) and 37(da)(iii) of the Act. In my judgment, the evidence of the defence had not rebutted the statutory presumption of possession under s. 37(d) of the Act. By way of a separate exercise, in my judgment too the defence had not rebutted the statutory presumption of trafficking under s. 37(da)(iii) of the Act.

Section 182A(i) of the CPC enacts that at the conclusion of the trial, the court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt. Section 182A(ii) of the CPC further enacts that if the court finds that the prosecution has proved its case beyond reasonable doubt, the court shall find the accused guilty and he may be convicted thereon. I have vigorously applied these provisions of the CPC to the fore and it was my judgment having considered all the evidence adduced before this court that the prosecution had proved its case beyond reasonable doubt. Accordingly, I found the accused guilty as per the charge and convicted him forthwith. I sentenced the accused to death.